MISCELLANEOUS

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 585

THE SINCLAIR COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE AMERCAN RETAIL FEDERATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE*

The American Retail Federation (hereinafter referred to as the "Federation") is an organization composed of 73 national and state retail associations. The membership of these associations consists of a wide variety of retail businesses ranging in size from small local stores to large national chains, representative of all aspects of the retail industry.

*This brief is filed with the written consent of both parties, pursuant to Rule 42(2) of this Court.

The interest of the Federation, in urging reversal of the Board and Court below, is predicated upon the potentially substantial and far-reaching consequences that any decision in this case may have for the retail industry. The retail industry has been intimately involved in many landmark cases involving employer speech and communication and the limitations placed thereon. See *e.g. Bonwit Teller, Inc.*, 96 NLRB 608 (1951), *enf't den'd* 197 F.2d 640 (1952), *cert. den'd* 345 U.S. 905 (1953); *May Department Stores Co.*, 136 NLRB 797 (1962); *enf't den'd* 316 F.2d 797 (1963); *Montgomery Ward & Co.*, 145 NLRB 846 (1964), *enf'd* 339 F.2d 889 (1965). Likewise the use of bargaining orders based upon authorization cards as a penalty approach limiting employer speech as well as an abridgement of rights granted to employers and employees under the National Labor Relations Act, 29 U.S.C. 151 et seq., has a significant impact on labor relations in the retail industry. This has been of such continuing vital concern that the Federation has sought and has been given permission to present its views before appropriate congressional committees in this area. *Hearings Before the Special Committee on Labor, Committee on Education and Labor, House of Representatives,* 90th Cong., 1st Sess. (1967), H.R. 1175, *To Amend the National Labor Relations Act to Increase Effectiveness of Remedies,* pp. 383, 386-387, 393 (Committee Print); *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare,* Senate, 89th Cong., 1st Sess. (1965) S. 256, *To Appeal Section 14(b) of the National Labor Relation Act,* pp. 195, 196-198, 181-185 (Committee Print); *Hearings Before the Subcommittee on the Separation of Powers of the Committee on the Judiciary,* Senate, 90th Cong., 2nd Sess., *Congressional Oversight of Administrative Agencies* (NLRB), April 30, 1968.

PRELIMINARY STATEMENT

In July, 1965, the Teamsters Union began organizing the Sinclair Company's employees. From July to December, 1965, the Company, by written and oral communication, engaged in a campaign to persuade the employees to vote against the Union as their collective bargaining representative (App. 171). During this period, the Union claimed to have obtained signatures on authorization cards from a majority of the employees and requested recognition. The request for recognition was declined by the Company and the Union petitioned for a National Labor Relations Board (herein the "Board") election. In this election, the employees rejected the Teamsters Union, 7 votes to 6 (App. 166, 188). The Union objected to the conduct of the election, filed unfair practice charges alleging the employer's communication coerced the employees in the exercise of their statutory rights and alleging the employer unlawfully refused to bargain collectively with it. The Board found the communications violated section 8(a)(1) of the Act (App. 183, 164 NLRB No. 49). The election was set aside and, as the Board found the Company's refusal to grant recognition to the Teamsters was not motivated by a "good faith doubt", Sinclair was ordered to bargain with the Teamsters. The First Circuit Court of Appeals, 397 F.2d 157, granted enforcement of the Board's order (App. 210, 212).

SUMMARY OF ARGUMENT

I.

The National Labor Relations Act was designed to give employees the right to choose, or not to choose, a collective bargaining representative through a Board conducted secret ballot election.

The National Labor Relations Board has no authority to compel an employer who refuses to recognize a labor organization on the basis of authorization cards to bargain with the labor organization for the reason that the employer "lacked doubt." The policies and priorities of the Act, except in certain limited circumstances where the holding of a fair election is clearly impossible, are not effectuated by the determination of representative status on the basis of authorization cards. Congress rejected the use of authorization cards which are highly unreliable, and provided a more conclusive method for the determination of employee choice, the secret ballot. Because of the conflicting and confusing Board and Court interpretations, this Court should delineate the Board's remedial authority to use authorization cards in lieu of secret ballot determinations.

II.

The Board and First Circuit abridged employer's freedom of speech as guaranteed by the First Amendment by utilizing a test which severely limits rather than fosters the traditional constitutional concept of free debate. Free debate and discussion is as vital in the labor-management arena as it is in any other area of our society. Unless the employer by clear language threatens to use his economic power by way of reprisal or promise of benefit, any curtailment of such debate and discussion casts the Board in the role of censor, and impinges on the First Amendment to our Constitution and Section 8(c) of the National Labor Relations Act.

ARGUMENT

I.

THE BOARD HAS NO AUTHORITY TO COMPEL EMPLOYERS TO BARGAIN BASED ON UNION AUTHORIZATION CARDS UNLESS THE CONDUCT OF A FAIR ELECTION IS IMPOSSIBLE.

A. Where a Question of Representation Exists, Section 9(c) of the Act Requires That Employee Choice Shall Be Determined by Secret Ballot.

(1) The Nature of the Issue.

The dominant theme of the National Labor Relations Act[1] is the right of employees to exercise a choice with respect to whether they desire a bargaining agent. Section 7 of the Act[2] provides that employees shall have the right to determine whether or not they desire union representation; Section 8[3] provides that neither employers nor labor organizations shall interfere with that right; and Section 3[4] establishes an agency, the National Labor Relations Board, to protect the exercise of this right through remedial powers granted in Section 10[5]. Thus, in numerous sections of the Act, using numerous forms of expres-

1. 29 U.S.C. § 151, *et seq.*

2. 29 U.S.C. § 157, which provides:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

3. 29 U.S.C. § 158.

4. 29 U.S.C. § 153.

5. 29 U.S.C. § 160.

sion, "Congress in the statute hammered home the right of the employees to a choice in respect to a bargaining agent."[6]

Section 9 of the Act establishes procedures to determine union representation. Section 9(a) provides that "representatives designated or selected . . . by the majority of employees . . . shall be the exclusive bargaining representative of all the employees" in an appropriate bargaining unit. A union may be "designated," (usually by means of authorization cards) by the employees and where the employer *voluntarily* and properly[7] accepts such designations, no question of representation[8] thereafter exists; or where the employer does not voluntarily and/or properly agree to such designations, a question of representation exists and the union may be "selected" by the employees through the election processes of Section 9(c).

The critical question in the instant case involves an asserted[9] judicial gloss on this statutory scheme: the

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6. *Amalgamated Clothing Workers (H. I. Siegel Co.)* v. *NLRB*, ____ F.2d ____, 70 LRRM 2207 (C.A. D.C., Jan. 9, 1969).

7. Where there are competing unions an employer may not properly extend voluntary recognition to one of the unions. See, e.g., *Midwest Piping and Supply Co., Inc.*, 63 NLRB 1060; *Novak Logging Co.*, 119 NLRB 1573, and cases cited therein. Voluntary recognition is also considered an improper denial of employee freedom where the union does not, in fact, have designations from a majority of the employees involved. See *International Ladies' Garment Workers Union (Bernard Altman)* v. *NLRB*, 366 U.S. 731 (1961).

8. A "question of representation," as used in Section 9(c) of the Act, is defined as "a claim of representative status in the unit covered by the petition, and rejection or questioning by the employer of the union's claim to be the present representative of the employees in the unit." *Kingsport Press, Inc.*, 150 NLRB 1157, 1157-8.

9. *Amicus* here assumes *arguendo* that the Board has authority to issue card check bargaining orders in a proper case. However, persuasive argument can be made, and will presumably be made by the Respondent in *NLRB* v. *Gissel Packing Co. et al.*, Nos. 573, 691, this term, that the Board has no authority to issue card-based bargaining orders *in any case*. Such a contention

Board policy to issue orders *requiring* that an employer extend recognition to a union without a secret ballot election. Thus, in the instant case, the Board concluded, and and the court below affirmed,[10] that the Union's authorization cards, in addition to their potential means of acquiring *voluntary* recognition, also served the further function of nullifying any question of representation and resultant need to utilize Section 9(c) election machinery. The basis for this conclusion, and for the issuance of an order requiring the employer to recognize the union as the employees' bargaining representative, was that the Teamsters' success in obtaining a majority of authorization cards, some four months prior to the employees' rejection of Union representation in a Board election, gave rise to a two-fold inference: that based on Sinclair's subsequent conduct (1) its earlier refusal to extend voluntary recognition was negatively inferred not to be "motivated by any good faith doubt as to the Union's majority status in an appropriate bargaining unit"[11] and (2) that such refusal was affirma-

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will, no doubt, emphasize that the Board has a number of devices to remedy pre-election employer misconduct, such as re-run elections, cease and desist orders and injunctions, and that these remedies were apparently considered adequate by the Board in many cases for the ten years prior to the Board decision in *Bernel Foam Produc Co.*, 146 NLRB 1277. The importance is in encouraging the Board and courts "to focus on the problem of the re-run election and the importance of searching for imaginative means to ensure that the impact of employer violations is dissipated." Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 860-1.

10. The Board did not, however, in significant contrast to the court below, place the burden of proof on the employer to demonstrate that his assertion of a good faith doubt has "some reasonable or rational basis in fact." (App. 212) Instead, the Board places the burden on the Board General Counsel to prove the lack of a good faith doubt. See *Aaron Brothers Co.*, 158 NLRB 1077; *John P. Serpa, Inc.*, 155 NLRB 99.

11. The Board views as determinative the basis of the employer's asserted doubt. If any reason, other than a doubt of the union's majority status, for example, is advanced for requesting an election, and the employer is in error in believing that such a reason would preclude certification, the fact that the refusal

tively inferred to be "instead motivated by a desire to gain time within which to dissipate that majority status"[12] (App. 212).

While the Board and the court below have thus engrafted on Section 9(a) an involuntary designation process, other Circuits have taken the far different view that such a bargaining order is warranted only where employer misconduct makes impossible the holding of a fair election under Section 9(c). A bargaining order under this approach is utilized only "in those exceptional cases where the employer's unfair labor practices are so outrageous and pervasive and of such a nature that their coercive effects cannot be eliminated by the application of traditional remedies."[13] The criteria is whether the employer's conduct, in the language of the Second Circuit, "was found to be clearly hostile to the union, and *without question* to have contaminated the results of *any* future election."[14] (Emphasis added).

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was made in good faith and that a fair election could still be held would not preclude issuance of a bargaining order. See, e.g., *H & W Construction Co.*, 161 NLRB 852; *Southland Paint Co.*, 156 NLRB 22; *Oklahoma Sheraton Corp.*, 156 NLRB 681.

12. The Board finds a "rejection of the collective bargaining principle" where the employer's conduct, although not involving any unfair labor practices, and not precluding a fair election from being held, nevertheless discloses a lack of a "good faith doubt" as to the union's majority. See, e.g., *Jem Mfg., Inc.*, 156 NLRB 643.

13. *NLRB* v. *Logan Packing Co.*, 386 F.2d 562 (4th Cir. 1967).

14. *NLRB* v. *Pembeck Oil Corp.*, ____ F.2d ____, 69 LRRM 2811 (2nd Cir. 1968). See also *NLRB* v. *River Togs, Inc.*, 382 F.2d 198 (C.A. 2). The recent position of the Sixth Circuit is similar. In *NLRB* v. *Priceless Discount Foods, Inc.*, ____ F.2d ____, 70 LRRM 2007 (6th Cir. 1968), that court held that a bargaining order was justified only where "flagrant" unfair labor practices were committed that render "it impossible for the Board to conduct a fair election" and, even in this case, such an order was conditioned on Board notification to the employees involved of their right to petition for decertification. See also the Sixth Circuit decisions in *Pulley* v. *NLRB*, 395 F.2d 870 (6th Cir. 1968), and *NLRB* v. *Ben Duthler, Inc.*, 395 F.2d 28 (6th Cir. 1968).

The Board has for example held that bargaining orders should only issue "in the exceptional and relatively infrequent situations in which an employer has, by his unfair labor practices, made a

In short, the critical issue is whether the function of card-based bargaining orders is to serve as a substitute for the 9(c) election machinery or whether, on the other hand, such orders constitute a third substantive means, in addition to the 9(a) voluntary "designation" and 9(c) "selection" processes, by which a union may obtain employer recognition of its alleged status to act as exclusive bargaining agent for employees. The position of the *amicus* is that, in view of the intent of Congress and the policies of the Act, reliance on authorization cards as predicates for bargaining orders should not constitute an alternate means of acquiring recognition and should be limited to the extraordinary case (clearly not present in *Sinclair*) where the election processes of Section 9(c) cannot be utilized.[15]

2. The Statutory Framework.

Section 9(c) provides: "*Whenever* a petition shall have been filed . . . (A) by . . . a labor organization . . . alleging that a substantial number of employees (1) wish to be

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fair election impossible. . . ." *McEwen Mfg. Co.*, 172 NLRB No. 99. See also *Hammond & Irving, Incorporated*, 154 NLRB 1071; *Clermont's Inc.*, 154 NLRB 1397. Supplemental Memorandum of the National Labor Relations Board to the Subcommittee on the Separation of Powers Committee on the Judiciary, *Congressional Oversight of Administrative Agencies (NLRB)*. United States Senate *Hearings*, 90th Cong., 2nd Sess., pp. 1666-7 (Committee Print 1968).

While such language closely resembles the approach of the Fourth, Second and Sixth Circuits, in practice, as in the instant case, the Board's focus has been on the employer's good faith and generally not, as a result, into whether a fair election in fact, may be held or the wisdom of issuing a bargaining order in a particular case. See Lesnick, *supra*, note 9 at 858-61. Such interchangeability and confusion between contradictory approaches, which may even occur in a single decision (e.g., *Aaron Brothers Co., supra*), underscores the need for the formulation of appropriate standards by the Court in the instant case. See Section D, *infra*.

15. The *amicus* also believes, as discussed in Section D of this Brief, that in order to insure that bargaining orders will only be employed in this exceptional situation, the Court should articulate appropriate criteria by which the Board and lower courts might adjudicate when, in fact, the holding of a fair election should be deemed impossible.

represented for collective bargaining and that *their employer declines to recognize* [the union] as the representative defined in section 9(a), . . . the Board shall investigate and . . . [if] a question of representation exists it *shall* direct an election by secret ballot and *shall* certify the results thereof." (Emphasis added.) Thus, unless the employer *voluntarily* recognizes the union, section 9(c) requires that employee choice shall be determined by secret ballot.

This has not always been the case.

Section 9(c) was the result of comprehensive revision by Congress in 1947 when it enacted the Taft-Hartley amendments to the Wagner Act. Section 9 of the Wagner Act, 49 Stat. 449 (1935), in section 9(c) had provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representative that has been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding *under § 10 or otherwise, and may take a secret ballot of employees or utilize any other suitable method to ascertain such representative.* (Emphasis added.)[16]

Under this section initially the Board resolved employee choice of representatives by checking authorization cards or by approving recognition agreements,[17] or by unfair labor practice proceedings under section 10.[18] But, the Board was soon "persuaded by [its] experience" that "bar-

16. II, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, 3274 (NLRB Ed. 1935).

17. Section 202.17, 29 C.F.R.—NLRB STATEMENTS OF PROCEDURE, Secs. 202.1-28, 11 Fed. Reg. 177A-619 (Aug. 28, 1946).

18. See *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944); *NLRB* v. *P. Lorillard Co.*, 314 U.S. 512 (1941); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318 (1940).

gaining relations from the beginning" would be more satisfactory "if doubt and any disagreement of the parties regarding the wishes of the employees" were eliminated. Accordingly, certifications in contested representation cases were discontinued in favor of resolution by secret ballot. *The Cudahy Packing Co.*, 13 NLRB 526, 531-32 (1939).

By the Taft-Hartley amendments, Congress, in addition to providing the secret ballot as the exclusive means under section 9 for resolving representative status, demonstrated its preference for resolution by secret ballot in other amendments to the Act, thereby attaching greater significance to such resolution by secret ballot. The twelve-month election bar period of section 9(c)(3), which was designed to prevent industrial turmoil by repeated questioning of representation status, does not operate unless there has been an election.[19] Recognitional picketing by a rival union is prohibited by section 8(b)(7)[20] only if the existing bargaining agent won a secret ballot election or has reached a collective agreement. Congress, likewise, chose the secret ballot election as the method for expediting the resolution of recognition strikes,[21] for determining bargaining agent authority to execute union shop agreements[22] and for permitting represented employees to reject their collective bargaining agent.[23]

Congress was well aware of the effect the 1947 amendments had on the authorization card process. When objections were raised by the House Minority Report that the new section 9(c) would have the effect of eliminating the

19. 29 U.S.C. § 159(e)(2); *National Waste Material Corp.*, 93 NLRB 477.

20. 29 U.S.C. § 158(b)(7).

21. 29 U.S.C. § 158(b)(7)(C).

22. 29 U.S.C. § 9(e)(1).

23. 29 U.S.C. § 9(c)(1)(A)(ii).

use of card checks and consent election agreements (which the minority considered to be very useful in cases where no real question existed), the provision from the Senate bill which permitted the use of consent election agreements was adopted in section 9(c)(4). But no recognition was given to the use of card checks, even consent card checks.[24] The Board thereafter recognized that a limitation had been imposed on its powers.[25]

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24. H.R. 3020, as reported, 80th Cong. 1st Sess., did not recognize consent election procedures. House Minority Report No. 245 on H.R. 3020, 80th Cong., 1st Sess., vigorously attacked this omission. S. 1126, 80th Cong., 1st Sess., contained a provision for consent elections, but no provisions recognizing the use of card checks. Senate Minority Report No. 105, Part 2, p. 34, argued that by eliminating card checks Congress "would deprive the Board of a proved and useful technique. . . ."

25. As the court observed in *NLRB* v. *Heck's*, 398 F.2d 337, 340, the 1948 Board Annual Report (p. 32) expressly recognized this limitation:

> "Section 9(c) of the Act, as amended, prescribes the election by secret ballot as the sole method of resolving a question concerning representation, and leaves the Board without the discretion it formerly possessed—but rarely exercised—to utilize other 'suitable means' of ascertaining representatives."

Two years later, however, in the leading case of *Joy Silk Mills* v. *NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. den'd* 341 U.S. 914, the Board's adoption of a "good faith doubt" precondition to invocation of the Section 9(c) election processes was approved in the following language which has provided the touchstone for subsequent Board doctrine:

> "The Act provides for election proceedings in order to provide a mechanism whereby an employer *acting in good faith* may secure a determination of whether or not the union does in fact have a majority and is therefore the appropriate agent with which to bargain. Another purpose is to insure that the employees may freely register their individual choices concerning representation. Certainly it is not one of the purposes of the election provisions to supply an employer with a procedural device by which he may secure the time necessary to defeat efforts toward organization being made by a union." 185 F.2d at 741. (Emphasis supplied).

As a result, the intent of Congress to provide that Section 9(c) be the exclusive means of determining questions of representation, irrespective of the employer's *bona fides* in desiring to utilize this "procedural device", has been completely ignored.

As several commentators[26] have indicated, the legislative history of this revision, particularly when coupled with other concurrent amendments to the Act,[27] fully supports the view that Congress intended to grant employers an absolute right to an election to determine questions of representation and preclude the use of authorization cards for this purpose. Only when no question of representation existed,[28] or when an election under Section 9(c) was rendered impossible, therefore, would a card-based bargaining order be warranted.

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26. Comment, *Union Authorization Cards*, 75 Yale L. J. 805 at 820-3; McGuiness, *Authorization Cards As Basis for Bargaining Order*, 68 LRR 85.

27. Employers, for example, were given for the first time the right to file a representation petition, thereby permitting an employer to question a union's representative status and have the question resolved by the Board election processes (29 U.S.C. 159(c)(1)(B)). By the simultaneous enactment of the Section 8(c) "free speech" provisions (29 U.S.C. 158(c)), such election processes guaranteed employees the "opportunity to hear arguments concerning representation" and placed them "in a better position to make a more fully informed and reasoned choice." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240.

28. Thus the Supreme Court in *Brooks* v. *NLRB*, 348 U.S. 96, 101 (1954), recognized that while the Taft-Hartley amendments provided that "Board certification could only be granted as the result of an election . . . an employer would presumably still be under a duty to bargain with an uncertified union *that had a clear majority*" (emphasis added). The emphasized language indicates the case where there no longer existed any question of representation, e.g., the factual situation involved in *NLRB* v. *Sehon Stevenson & Co.*, 386 F.2d 551 (4th Cir. 1964).

Similarly, the other post-1947 Supreme Court decision which touched upon the effect to be given authorization cards and which is continually cited as controlling precedent, *United Mine Workers* v. *Arkansas Oak Flooring*, 351 U.S. 62, 68-69 (956), stated merely that while the union there involved could not utilize the Board's certification processes, it was nevertheless not precluded from achieving voluntary recognition from an employer since a "Board election is not the only method by which an employer *may satisfy itself as to the union's majority status*" (emphasis added). Again, the decision is clearly consistent with the position that Congress intended the election procedures of Section 9(c) to be the exclusive method for determining questions of representation, although where no such question exists, Section 9(a) permits voluntary "designation" through authorization cards.

The Board's response to this legislative history has been to argue that the revision of Section 9(c) was merely intended to preclude the use of authorization cards and other non-election means to obtain Board certification through the Act's "selection" machinery; that Congress, by declining to simultaneously amend the reference to Section 9(a) in Section 8(a)(5) of the Act to require employer recognition of certified unions only (H. R. Rep. No. 245, 80th Cong., 1st Sess., 30, 53 (1947)), did not intend to foreclose the use of such other means as a basis for securing voluntary recognition (Bd. Pet. for Cert., *Gissel*, p. 22). Even assuming, however, that Congress did not wish to disturb the 9(a) voluntary designation processes, it is a wholly different proposition to urge that Congress intended to establish card-based bargaining orders as a separate, alternative method of acquiring recognition or that it intended that Section 9(a) embody the "good faith doubt" principle utilized by the Board to justify such orders.[29] At most, Congress

29. The argument of the Board is thus based on what Congress failed to do while ignoring what Congress did. The Board disregards, for example, the following amendments to Section 9(c):

(1) Prior to 1947, the Board had the prerogative to decide whether it would conduct an investigation. The amendments *required* the Board to conduct an investigation whenever a petition was filed by an employer or labor organization and hold an election if an employer denied recognition.

(2) Prior to 1947, Section 9(c) authorized the Board to issue bargaining orders pursuant to Section 10 of the Act. The amendments specifically deleted this reference.

(3) Prior to 1947, the Board was empowered to use "any other suitable method" besides an election to determine a collective bargaining representative. The amendments forbade it.

The retention of the "designation or selection" language in Section 9(a) of the Act, while eliminating the same language from Section 9(c), was to accommodate the process of *voluntary* recognition which did not require an altering of the then existing language of Section 8(a)(5). Thus, since an employer could violate Section 8(a)(5), regardless of whether a union's majority status was established by a 9(c) election or voluntary recognition, there

merely permitted the Board to continue its prior practice[30] of issuing card-based bargaining orders solely as a remedy for situations where an election could not be conducted under Section 9(c).

This is the mandate the Board must follow. As stated by Mr. Justice Holmes sitting as Circuit Judge in *Johnson* v. *United States*, 163 Fed. 30, 32:

> The Legislature has the power to decide what the policy of the law shall be, and if it has intimated its will, however, indirectly, that will should be recognized and obeyed. The major premises of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: "We see what you are driving at, but you have not said it, and therefore we shall go on as before."

B. Secret Ballot Choice Is a More Reliable Indicia of Employee Choice Than Authorization Cards.

Thus, Congress clearly recognized by amendment, as had the Board earlier, that the secret ballot election conducted under close supervision of the Board was the best vehicle for employees to exercise their right to select representatives of their own choosing wherever questions of representation exist.[31] Today, the election process is still

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was no need to revise that section, particularly since the main concern therewith "was related to the subject of bargaining as distinct from recognition." Comment, 75 Yale L. J. 805 at 820, fn. 103.

30. The leading pre-1947 Supreme Court decision authorizing card-based bargaining orders, *Franks Bros.* v. *NLRB*, 321 U.S. 702, thus justified issuance of such orders solely on the ground that it represented a proper exercise of the Board's remedial powers.

31. Significantly, many of the same circuit courts which have adhered to the Board's "good faith doubt" approach have nevertheless voiced substantial disagreement with the Board's view on card misrepresentations and have suggested that such a test applies a mechanistic and far too lax a standard. See *Engineers & Fabricators, Inc.* v. *NLRB*, 376 F.2d 482 (C.A. 5); *NLRB*

considered by the Board, at least when subject to congressional inquiry, to be the "most conclusive, and therefore the most satisfactory, means of testing a union's majority interest,[32] since authorization cards are not as "reliable as the secret ballot elections which the Board conducts. . . ."[33] Reviewing circuit courts have similarly recognized that ". . . it is beyond dispute that a secret election is a more accurate reflection of the employees' true desires than a check of authorization cards collected at the behest of a union organizer."[34] Indeed, the AFL-CIO is most candid on this issue: ". . . cards are at best a signifying of intention at a given moment. Sometimes they are 'signed to get the union off my back' . . . whatever the reason, there

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v. *Swan Super Cleaners*, 384 F.2d 609 (C.A. 6); and *NLRB* v. *Dan Howard Manufacturing Co.*, 390 F.2d 304 (C.A. 7). The Second and Fourth Circuits have also questioned the validity of the Board's card misrepresentation principles. See *Crawford Manufacturing Co.* v. *NLRB*, 386 F.2d 367, *cert. den'd* 390 U.S. 1028 and *NLRB* v. *Nichols Co.*, 380 F.2d 438.

However, the question of solicitor misrepresentation and the validity of the Board's sole and only purpose rule, *Cumberland Shoe Corp.*, 144 NLRB 1268, enforced 351 F.2d 917 (C.A. 6), is not directly an issue in this case. This issue was raised in three cases in which petitions for certiorari were denied last term. *NLRB* v. *Crawford Mfg. Co.*, No. 1050, 390 U.S. 1028; *Preston Products Co.* v. *NLRB*, No. 1367, 392 U.S. 906; *Bryant Chucking Grinder Co.* v. *NLRB*, No. 1324, 392 U.S. 908. Indeed, the issue is now before this Court on a petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit. *Thrift Drug Co. of Pennsylvania, Petitioner*, v. *NLRB*, No. 906, this term. The memorandum for the National Labor Relations Board opposed granting of the writ on the ground that "As in *Atlas Engine Works v. NLRB*, No. 598, this Term (Memorandum for the respondent, pp. 3-4), the Board sees no reason why review of this issue is any more warranted now than it was last Term."

32. Memorandum from Secretary Wirtz to Senator Javits, TO REPEAL SECTION 14(b) OF THE NATIONAL LABOR RELATIONS ACT, *Hearings Before the Subcommittee on Labor of the Committee on Labor and Public Welfare*, 89th Cong., 1st Sess., p. 19 (committee print—1965).

33. NOMINATION Hearings, Chairman Frank McCulloch Before the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess., p. 4 (committee print—1965).

34. *NLRB* v. *Flomatic Corp.*, 347 F.2d 74, 78 (2 Cir. 1965).

is no guarantee of anything in a signed NLRB pledge card except that it will count toward an NLRB election." AFL-CIO, 1961 GUIDEBOOK FOR UNION ORGANIZERS.

Statistics as well support no other conclusion. Board Chairman McCulloch cites statistics which demonstrate the unreliability of cards:

> In 58 elections, the unions presented authorization cards from 30 to 50% of the employees; and they won 11 or 19% of them. In 87 elections, the unions presented authorization cards from 50 to 70% of the employees, and they won 42 or 48% of them. In 57 elections, the unions presented authorization cards from over 70% of the employees, and they won 43 or 74% of them.[35]

Indeed, because of the circumstances surrounding the organization effort, the conclusion that cards are inherently unreliable has much support. Admittedly, at least where two unions were involved, cards are "notoriously unreliable in determining majority of a union as the basis for making a contract", *Sunbeam Corp.*, 99 NLRB 546, 550-51, and cards "do not necessarily reflect the ultimate choice of a bargaining representative . . ." *Midwest Piping and Supply Co.*, 63 NLRB 1060.[36]

Comparison of the authorization card process with the secret ballot process leads to a similar result. Authorization cards may be signed at work, at home, at union halls or in a number of places.[37] The card signer may not be

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35. 1962 PROCEEDINGS, SECTION OF LABOR RELATIONS LAW, AMERICAN BAR ASSOCIATION 14-17. See also, *NLRB* v. *Johnnie's Poultry Co.*, 344 F.2d 617, 620 (8th Cir. 1965), relying on such statistics in a card check case.

36. In *Levi Strauss & Co.*, 172 NLRB No. 57, 68 LRRM 1338, 1342 (1968), the Board argues this only applies in a two-union situation, but does not explain why it is not also significant in any organizing situation.

37. See *Hearings* on Section 14(b), *supra*, note 32, at p. 190, for the many places cards are solicited.

alone; union organizers, fellow employees, or even a working foreman may be peering over the employee's shoulder. But, the ballot, after it is received from election observers and the supervising Board representative, is cast in secrecy in a ballot booth. While the authorization card may abound with fine print and use confusing language, the secret ballot provides simple "yes" or "no" squares for the placing of an "X". Although the employee may have been handed the authorization card seconds before he signs, the sample ballot has been displayed for several days as part of an NLRB election poster which also explains in white and blue lettering the employees' section 7 rights.[38] This election poster has been printed in virtually every significant foreign language to insure full understanding, but the Board has accepted as valid indicators cards which are printed in a language foreign to the signing employee, with no interpreter present.[39] Then, of course, the free debate in many cases has not been held and the employees, when requested to sign, have not received the full information necessary to a reasoned choice:

> "The union is not likely to describe accurately the probable advantages of organizing much less present the disadvantages when cards replace the secret ballot, an employee may sign at any time; and when a majority sign, the contest may be over. Thus, the employer loses the opportunity to rebut the final persuasive union argument. If that argument involves inaccurate or fraudulent assertions about the employer's

38. See NLRB Rules and Regulations 102.1, 102.69, 26 F.R. 3885 (May 15, 1961). The election notice and sample ballot are form NLRB-707(1-67).

39. In *NLRB* v. *River Togs, Inc.*, 382 F.2d 198 (2d Cir. 1967), the Court denied enforcement of the bargaining order, rejecting the Board argument that inability to read the authorization card on the part of employees speaking a foreign language is not fatal. By contrast, election notices have been translated into almost every language on the linguistic spectrum, the Court noted. 382 F.2d at 205, fn. 10.

business or the union's past record, any employer rebuttal comes too late to be effective.[40]

Finally, as many reported cases demonstrate, employees because of solicitor statements may have only been initiating the election process by signing the card (nomination petitions are common) rather than making their ultimate choice.[41]

C. The Policies of the Act Are Disregarded by Predicating Bargaining Orders on the Employer's "Good Faith Doubt."

By placing the focus on the employer's subjective state of mind, the Board has rejected clear congressional intent and, instead, has given independent meaning to a catch phrase employed by the circuit court in *Joy Silk Mills, Inc.* v. *NLRB*, 185 F.2d 732 (D.C. Cir. 1950), *cert. denied* 341 U.S. 914 (1951).

In *Joy Silk Mills*, the employer, immediately prior to the election, interrogated employees as to their union sympathy, threatened employees with reprisals, and promised additional benefits if the union were rejected. There was no question the union had a clear card majority. The Board found the unlawful acts rendered a "free election impossible" and entered a bargaining order. 85 NLRB 1263, 1264. In enforcing the order, the Court stated:

> An employer may refuse recognition to a union when motivated by a good faith doubt as to the union's majority status. . . . When, however, such refusal is due to a desire to gain time and to take action to dis-

40. Comment, 75 Yale L. J. at 827-828, 834.

41. *NLRB* v. *Swan Super Cleaners, Inc.*, 384 F.2d 609 (6th Cir. 1967); *NLRB* v. *S. E. Nichols Co.*, 380 F.2d 438 (2d Cir. 1968); *NLRB* v. *Dan Howard Mfg. Co.*, 390 F.2d 304 (7th Cir. 1967); *Bauer Welding and Metal Fabricators, Inc.*, 358 F.2d 766, 774 (8th Cir. 1966); *Crawford Mfg. Co.* v. *NLRB*, 386 F.2d 367 (4th Cir. 1967), *cert. den'd* 390 U.S. 1028 (1968).

> sipate the union's majority, the refusal is no longer justifiable and constitutes a violation of the duty to bargain. . . . 185 F.2d at 741.

The phrase "good faith doubt" was inappropriately taken from precedent decided prior to Taft-Hartley, and the bargaining order was not predicated on a construction of section 9(c) and section 8(a)(5), but on the Board's section 10 remedial powers as its citation to this Court's decision in *Franks Bros. Co. v. NLRB*, 321 U.S. 702 (1944), demonstrates.

But today, by giving unprecedented emphasis to the Court's prefatory reference to "good faith doubt," resolution of representation status by the card process has equal standing with the secret ballot process. Thus, when presented with a request for recognition based upon an asserted card majority, the duty to bargain is said to have commenced irrespective of the existence of the preferred secret ballot process, and although the employer committed no unlawful acts. *H-W Construction Co.*, 161 NLRB 852.

Likewise, the insistence on an election does not give rise to the inference the employer was rejecting the principle of collective bargaining. If an employer has a right to file a representation petition when presented with a request for recognition (and section 9(c) gives him this right), and if the employer may inform the employees of the "cons" of union representation (and section 8(c) gives him this right), then it follows that the employer has a right not to deal with the union until his employees vote by secret ballot to the contrary. But, in disregard of both employer and employee rights, the Board prefers a Hobson's choice: If the employer refuses to grant recognition, and the union had a majority, it violates section 8(a)(5). If, however, the employer has no "good faith doubt" and bar-

gains with the union, which did not in fact have a majority, it likewise violates the Act. *International Ladies' Garment Workers* v. *NLRB*, 366 U.S. 731 (1961). The statute did not intend such a legal anachronism.[42]

In sum, as Judge Learned Hand aptly observed: "As a penalty [a bargaining order based on subsequent employer conduct] might be proper, but as a link in reasoning it seems to us immaterial."[43] The significance of unfair labor practices is only as a measure of whether a fair election is possible and employer conduct subsequent to a recognition demand, lawful or otherwise, clearly is irrelevant.

D. The Court Should Articulate Criteria to Determine When, in Fact, the Holding of a Fair Election Should Be Deemed Impossible.

(1) The Need to Articulate Appropriate Criteria.

The *amicus* believes that it is essential, for the reasons described in Sections A to C, *supra*, that the Court should limit the issuance of card-based bargaining orders to those situations where it is expressly found that utilization of the Section 9(c) election machinery has been precluded by employer misconduct. In order to insure, however, that such a "fair election impossible" rule will result in a wholly different Board approach, not merely a different Board talisman, the Court we respectfully submit, should also define appropriate standards to determine when, in fact, the election processes cannot properly be invoked.

The necessity for an articulation of specific criteria is evident from the interchangeability of the language of the substantive and remedial approaches, with no apparent

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42. Lesniok, *Establishment of Bargaining Rights Without an NLRB Election*, 65 Mich. L. Rev. 851, 855 (1967), criticizes the inference the "doubt" test requires the Board to draw.

43. *NLRB* v. *James Thompson & Co.*, 208 F.2d 743, 746 (C.A. 2).

difference in actual result, reflected in past Board decisions.[44] The current Board practice, in determining whether an employer has evidenced lack of a "good faith" doubt or "a rejection of the collective bargaining principle", is to look at "all the relevant facts of the case, including any unlawful conduct of the employer, the sequence of events, and the time lapse between the refusal and the unlawful conduct."[45] It is indeed doubtful whether another set of rules or standards could be constructed which would be less predictable, less precise, and give less assistance to those who would seek to employ them as a guide for future conduct.[46] As Judge Friendly has observed with respect to the Board practice in the related field of authorization card misrepresentations: "The extensive discussion of evidence in such cases [citing circuit court decisions] . . . was necessitated by the Board's use of the wrong standard and the courts' desire to avoid a time consuming remand; once the Board adopts the proper standard, judicial review . . . should not be substantially more difficult than under the [present Board standard]."[47]

The concern of the *amicus* is that even if the suggested "fair election impossible" view of card-based bargaining orders is adopted herein, the Board will merely thereafter employ a different vehicle to arrive at its present position. This fear is underscored by the Board's insistence that it

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44. See footnote 14, *supra*.

45. *Aaron Brothers Co., supra.*

46. The vacillating criteria may perhaps explain how the Board can assert on one hand that card-based bargaining orders are used only in "the exceptional and relatively infrequent situations" (*Levi Strauss & Co., supra*) or, as described by Former Secretary of Labor Wirtz, in "rare exceptions" (Wirtz, *supra*, n. 20, 25), while, conversely, suggesting in the instant case that such cases occur "frequently" and "often" (Bd. Pet. for Cert., pp. 17-18).

47. *Bryant Chucking Grinder Co.* v. *NLRB*, 389 F.2d 565 (2nd Cir. 1967) (concurring opinion).

must be left free to broadly determine in which cases a bargaining order is warranted,[48] a degree of discretion which has been readily granted by several courts.[49] The Board has been unable to articulate a rational position. The decisions are replete with confusing and conflicting interpretations, which do not clarify, but which obfuscate. Reviewing courts need not adhere to assumed Board expertise where the matter at issue involves substantial legal questions or fundamental policy decisions. As this Court observed in *NLRB* v. *Brown*, 380 U.S. 278, 291 (1965):

> "Reviewing courts are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute."[50]

Courts have attempted to indicate appropriate criteria to resolve the difficult "determination of whether a re-run election or the cards will more reliably indicate the desires of the employees or whether a re-run election will be contaminated by the prior violations . . ."[51] The significance of this determination, however, requires that it not be left to shifting and conflicting opinions of the Board

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48. See, e.g., Bd. Pet. for Cert., *Gissel*, p. 18, fn. 18.

49. See, e.g., *NLRB* v. *Goodyear Tire & Rubber Co.*, 394 F.2d 711 (5th Cir. 1968); *Furr's, Inc.* v. *NLRB*, 381 F.2d 562 (10th Cir. 1967).

50. See also *NLRB* v. *Gotham Shoe Mfg. Co.*, 359 F.2d 684 (2nd Cir. 1966) (concurring and dissenting opinion), and the Court's utilization of, and reliance on, appropriate standards in the application of another provision of the Act in *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961), where the Court articulated specific guidelines for determining the legality of reserved gate picketing under Section 8(b)(4)(A) of the Act.

51. *NLRB* v. *Ben Duthler, Inc., supra*, where the Sixth Circuit went on to define the "pertinent considerations" to be "the nature of the Section 8(a)(1) violations, the percentage of employees signing authorization cards, the wording of the cards and the method of soliciting signatures, and the results of any Board election". See also *Clothing Workers* v. *NLRB, supra*, note 6.

and lower courts but, rather that this Court should alleviate the current confusion rampant in the area by establishing as predictable and specific standards as possible.

(2) Suggested Criteria to Determine When, in Fact, the Holding of a Fair Election Should Be Deemed Impossible.

Any attempt to delineate the limits of that area in which a card-based bargaining order should be utilized as a substitute for the Act's election processes must take into account, as the court observed in *NLRB* v. *Ben Duthler, Inc.*, two values of paramount importance: the right of employees to determine whether they desire to bargain collectively or to refrain from such bargaining; and the need to remedy employer unfair labor practices. There must be adequate recognition of the primacy of secret ballot election for employees, with a workable solution for the extreme situation in which a pattern of coercive and oppressive conduct precludes the holding of a fair election.

One such proposal, which has received both Congressional[52] and Board[53] recognition, is suggested by the *amicus* for consideration. This approach recognizes three separate components of the "fair election" test, each of which must be demonstrated by the Board's general counsel, to provide evidentiary guide lines for a reviewing court in determining whether the "strong medicine" of a card-based bargaining order was justified:

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52. Bill introduced by Senator Fannin during the 1965 hearings on the proposed repeal of Section 14(b) of the Act entitled S. 2226, 89th Cong., 1st Sess. (1965). See 111 Cong. Rec. 14584 (daily ed. June 29, 1965).

53. An approach was advocated in 1968 in a statement presented to the Senate Judiciary Committee Subcommittee on Separation of Powers by Gerard C. Smetana, which was thereafter cited with approval by the Board in its Supplemental Memorandum. See, *Hearings, supra*, note 14, pp. 1078-9 (Committee Print 1968).

(1) That the union obtained authorization cards from a majority of the employees in an appropriate unit without coercion or misrepresentation.[54]

(2) That thereafter, the employer engaged in an intentional course of unlawful conduct, the effects of which cannot be dissipated by other available remedies. This would require a showing of (a) the requisite employer intent (which would exclude minor and advertent violations by lower-level supervision), (b) a course of employer conduct (which would exclude isolated incidents), and (c) the futility of utilizing other remedies, such as those discussed at footnote 2, *supra*, to ascertain the true union desires of the employees.

(3) That each of the improper acts on the part of the employer constituted independent violations of Section 8 of the Act rather than merely conduct which the Board considered sufficient to set aside on election or, as in the instant case, a "totality" of otherwise lawful conduct.

If the test is not met, representation questions should be determined solely by secret election. Otherwise, normal Board curative remedies should be applied.[55]

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54. The standards to determine whether such coercion or misrepresentation occurred should, in the opinion of the *amicus*, be similar to those which have been adopted by the Second, Fourth, Fifth, Sixth and Seventh Circuits. See note 14, *supra*.

55. See note 9, *supra*. Where a union presently does not have authorization cards from a majority of the employees involved, and the employer engages in pervasive and substantial misconduct, the Board has devised imaginative remedies to meet the situation. See, e.g., *J. P. Stevens & Co.*, 157 NLRB 869 and *H. W. Elson Bottling Co.*, 155 NLRB 714.

Conclusion: A Bargaining Order Was Not Appropriate in the Instant Case.

Clearly, the Board's rejection in the present case of the employees' right to choose or not to choose a bargaining agent is not compatible with the intent of Congress and the underlying policies of the Act. There was no finding by the Board, nor could there be, that a fair election would have been an "exercise in futility."[56] Far from it. Sinclair did not engage in a series of independent unfair labor practices; rather, any alleged misconduct could have been easily dissipated by application of traditional Board remedies. The decision of the court below should be reversed.

II.

EMPLOYER SPEECH IS PROTECTED BY FIRST AMENDMENT AND SECTION 8(c) OF THE TAFT-HARTLEY ACT

A. The Nature of the Issue.

It is the view of *amicus* that the Board abridged Sinclair's right to free speech and the employees' equivalent "right to listen" and to make a reasoned choice, by setting aside the secret ballot election in which the employees rejected Teamster representation. The Board did so by improperly finding the employer's speech was an unfair

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56. In an address by NLRB Associate General Counsel H. Stephan Gordon before the George Washington University National Law Center on February 15, 1968, entitled "Union Authorization Cards and the Duty to Bargain", reprinted at 67 LRR 155, 183, in which Mr. Gordon recognizes the importance of the secret ballot by quoting the simple but eloquent phrase of Winston Churchill:

> "At the bottom of all tribute paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross, on a little bit of paper . . . no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point."

labor practice and by using this speech as evidence that the employer refused to bargain. This Court has traditionally held speech, not a part of unlawful conduct as such, entitled to constitutional protection. Congress in 1947 accommodated the right of speech within the policies of the National Labor Relations Act by formulating an objective standard which limited the Board's authority to abridge speech: the Board cannot censor speech when speech contains no threat of reprisal or force or promise of benefit. The Congress and the Constitution intended free debate among all participants so that a reasoned choice could be exercised.

In the campaign preceding the election in the case at bar, there was vigorous debate on the question of representation by both sides. Sinclair expressed its views to the employees vigorously but truthfully on the merits of selecting the Teamsters Union as the bargaining agent. The scope of the campaign is set forth in petitioner Sinclair's brief and need not be here repeated. Suffice it to say that the Board found no single communication to be an unfair labor practice; only that the "totality" of the employer's communications constituted improper threats within the meaning of section 8(a)(1).

In finding the speech an unfair labor practice, we submit that the Board and the Court impinged on the standards set down by the First Amendment and by section 8(c) of the Taft-Hartley Act when (1) it grounded its decision on the "belief" or "impression" allegedly created on the employees rather than on the "speech itself," and (2) it censored speech dissociated from conduct which was subject to free debate.

B. Test Used by Board and Court in Evaluating Employer Speech Offends the Constitutional and Congressional Standards.

Freedom of speech extends to speech in the context of a labor dispute. While decisions do not draw a hard and fast line of demarcation for the outermost limits before speech ceases to be free, it is immaterial that the forum for speech is the working place and not the marketplace. This Court has long recognized that governmental regulation in the labor relations field must yield to First Amendment freedoms and free speech can no more be abridged by invoking the National Labor Relations Act than by invoking state statutes to regulate such activity. *Thornhill* v. *Alabama*, 310 U.S. 82 (1940); *NLRB* v. *Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *Thomas* v. *Collins*, 323 U.S. 516 (1945).

In the case at bar, the Board, in determining the speech and writings were coercive ignored the total absence of illegal activities or conduct. The Board found:

> . . . the series of letters, pamphlets, leaflets, and speeches from and by President Sinclair, hereinabove described, taken together and considered as a whole, reasonably tended to convey to the employees the *belief or impression* that selection of the Union in the forthcoming election *could* lead Respondent to close its plant, or to the transfer of the weaving production, with the resultant loss of jobs to the wire weavers. (Emphasis added, App. 183).

The First Circuit, in rejecting Sinclair's argument that since the statements considered separately were lawful, the combination of them was simply cumulative and could not be characterized as illegal conduct, stated:

> The problem is not as simple as that. Conveyance of the employer's belief, even though sincere,

> that unionization will or may result in the closing of the plant is not a statement of fact, unless, which is most improbable, the eventuality of closing is capable of proof. . . . Moreover, in considering coercive effect the test is the totality of the circumstances. . . . (Citations omitted, App. 209).

Then, noting that whether the employer has used language that is coercive in its effect "is a question essentially for the specialized experience of the Board," the Court set out the "coercive" statements:

> It is evident that Sinclair's communications were designed to impress upon the wire weavers (1) that the 1952 strike had left the company in a state of continuing financial difficulty; (2) that the union's only weapon is a strike and the Teamsters Union is a "strike happy outfit"; (3) that another strike could, and in his opinion would, close the plant and (4) that it would be difficult for the wire weavers because of their age and limited education to secure other employment. (App. 210).

The focus by the Board and the Court on what the employees *believed* rather than the words the employer used to determine whether speech was coercive demonstrates clearly the Board has returned to its rejected Wagner Act test.

The Wagner Act, by section 8(1), prohibited an employer from restraining, coercing or interfering with employees' exercise of statutory rights.[57] No portion of the

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57. The same provision appears as Section 8(a)(1), 29 U.S.C. § 158(a)(1): "It shall be an unfair labor practice for an employer—(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7."

Section 7, 29 U.S.C. 157, provides:

> Employees shall have the right to self-organization, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the

Act expressly curtailed the application of section 8(1) in cases involving speech or communication, and any antiunion expression by an employer was initially viewed by the Board,[58] with some circuit court approval,[59] as "interfering" with the exercise by employees of their organizational rights. Thus, it was said in 1941:

> Arguments by an employer directed to his employees have . . . an ambivalent character; they are legitimate enough as such, and pro tanto the privilege of "free speech" protects them; but, so far as they also disclose his wishes, as they generally do, they have a force independent of persuasion. The Board is vested with power to measure these two factors against each other, a power whose exercise does not trench upon the First Amendment.[60]

The standard for review of Board findings was then regarded as limited, with the emphasis on what the employees might think, rather than on what employers said. Judge Learned Hand in 1943, in *NLRB* v. *American Tube Bending Co.*, 134 F.2d 993 (2d Cir. 1943), *cert. den'd* 320 U.S. 768 (1944), summarized what he believed to be the early, erroneous approach:

> . . . any address . . . from an employer made directly to his employees may have, and ordinarily will have, a double aspect: on the one hand it is an expression of his own beliefs and an attempt to per-

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purpose of collective bargaining or other mutual aid and protection, *and shall have the right to refrain from any or all of such activities*. . . .

The italicized portion was added by Taft-Hartley.

58. See, e.g., *Roberts Bros., Inc.*, 18 NLRB 925; *Ford Motor Co.*, 23 NLRB 342.

59. See, e.g., *Continental Box Co.* v. *NLRB*, 113 F.2d 93 (5th Cir. 1940). *But see, Midland Steel Products Co.* v. *NLRB*, 113 F.2d 800 (6th Cir. 1940).

60. *NLRB* v. *Federbush Co., Inc.*, 121 F.2d 954, 957 (2nd Cir. 1941).

suade his employees to accept them; *on the other hand, it is an indication of his feelings which his hearers may believe will take a form inimical to those whom he does not succeed in convincing.* Insofar as it is the first, the Constitution protects him; insofar as it is the second, it does not. *The Board, being composed of those especially versed in the subject matter, must decide how far the second aspect predominates, and if they conclude that it will seriously coerce the employees' freedom of choice, they may forbid it.* (Emphasis added.) 134 F.2d at 994.

and rejected it. He stated:

> But there was no intimation of reprisal against those who thought otherwise; quite the opposite. The most that can be gathered from them was an argument, temperate in form, that a union would be against the employees' interests as well as the employer's, and that the continued prosperity of the company depended on going on as they had been. 134 F.2d at 995.

Judge Hand's conclusion was formulated from this Court's rationale in *Virginia Electric, supra,* decided two years earlier. There, although this Court indicated support for the Board's conclusion of employer domination of a union in violation of section 8(2) of the Wagner Act, this Court, in assessing the statutory prohibition in light of the First Amendment, stated in an opinion by Justice Murphy:

> *The employer in this case is as free now as ever to take any side it may choose on this controversial issue.* But certainly *conduct,* though evidenced in part by speech, may amount in connection with other circumstances to coercion within the meaning of the Act. If the total *activities* of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. (Emphasis added.) 314 U.S. at 477.

The Court regarded as critical the *activities* of the company consisting of a discriminatory discharge and unlawful acts of assistance to the union, and questioned whether a bulletin and speech were coercive without regard to the other conduct. The Court therefore remanded. Significantly, the Court noted that if the utterances were *separated* from conduct it would "find it difficult to sustain a finding of coercion with respect to them alone." 314 U.S. at 479.[61]

Any question concerning the applicability of the First Amendment guarantees to employer free speech rights was finally resolved by this Court in *Thomas* v. *Collins*, 323 U.S. 516 (1945). There, in setting aside a Texas licensing statute on constitutional grounds, this Court held that by *Virginia Electric* it had

> . . . recognized that employers' attempts to persuade to action with respect to joining or not joining unions are within the First Amendment guarantee. . . . But, short of that limit [where conduct is added] the employers' freedom cannot be impaired. The Constitution protects no less the employees' converse right. 323 U.S. at 537.

The Court, in *Thomas*, reiterated its earlier position in *Thornhill* v. *Alabama*, *supra*:

> In the circumstances of our times, the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. . . . Free discussion concerning the conditions in industry and causes of

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61. Judge Hand, reviewing the Court's decision in *Virginia Electric*, said that:

> The conclusion seems inevitable that the Court did not believe that the bulletin and the speech would alone support a finding of coercion. Possibly it so concluded because they could not have, in fact, coerced the employees; but we do not so understand it; the employer had raised his privilege and we read the decision as sustaining it. 134 F.2d at 995.

> labor disputes appears to us indispensable to the effective intelligent use of the process of popular government to shape the destiny of modern industrial society. 323 U.S. at 537.

The Court also rejected the approach which the Board and the First Circuit now takes in its "totality" concept, which failed to distinguish between "speech" dissociated from "conduct." Justice Douglas, joined by Justices Black and Murphy, concurring, distinguished between the use of economic power and speech dissociated from conduct, stating:

> But as long as he [the employer] does no more than speak, he has the same unfettered right, no matter what side of an issue he espouses. 323 U.S. at 544.

Justice Jackson, also concurring, asserted:

> Free speech on both sides and for every faction on any side of the labor relation is to me a constitutional and useful right. Labor is free to turn its publicity on any labor oppression, substandard wages, employer unfairness, or objectionable working conditions. The employer, too, should be free to answer, and to turn publicity on the records of the leaders or the unions which seek the confidence of his men, and if the employer or organizers associate violence or other offense against the laws with labor's free speech, or if the employer's free speech is associated with discriminatory discharges or intimidation, the constitutional remedy would be to stop the evil, but permit the speech if the two are separable; and *only rarely and when they are inseparable, to stop or punish speech or publication.* 323 U.S. at 547.

Since *Virginia Electric,* this Court has refused to consider words as an unfair labor practice when they are dissociated from conduct. *NLRB* v. *Exchange Parts Co.,* 375 U.S. 405, 410, n. 3 (1964).

Free speech is no less free speech because the utterances occur prior to a representation election, though robust and vigorous. This Court gave recognition to this in *Linn* v. *United Plant Guard Workers*, 383 U.S. 53 (1963), and, relying on traditional free speech concepts, held that organizing campaign speeches

> . . . are to be considered "against the background of a profound . . . commitment to the principle that debate . . . should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks." 383 U.S. at 62.

Yet, in the case at bar, the Board, in determining that the speech and writings were coercive, acted as though *Virginia Electric* and *Linn* were dead letters. Ignoring the fact that the speech was in no sense associated with any illegal conduct,[62] the Board found that the employer communications created "the *belief or impression* that selection of the union in the forthcoming election *could* lead" to dire consequences. (App. 183, Emphasis added.)

The Board's conclusion was adopted by the Court. But such a focus on employee surmise has been abandoned, as shown by this Court's pronouncements in *Virginia Electric, supra; Thomas* v. *Collins, supra;* and *Thornhill* v. *Alabama, supra.* To paraphrase Justice Douglas in *Thomas* v. *Collins*, "Here, Sinclair did no more than speak" and the "rare case" referred to by Justice Jackson, where speech was inseparable from other unlawful conduct, patently did not exist.

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62. The only other act involved was the employer refusal to grant recognition. This act is not illegal *per se* and was found to be illegal only *because* the speech was found "coercive". This finding of coercion gave rise to the inference the refusal was unlawful (App. 195). It would indeed be anomalous to continue with the circuitous reasoning and hold the speech was unprotected as it was connected with conduct, otherwise legal, which was illegal because of the speech, which without the illegal conduct would have been protected.

The decision of this Court in *Thomas* v. *Collins* guaranteeing full freedom of speech was approved when Congress, by the Taft-Hartley amendments, enacted section 8(c) of the Act. This limitation on Board authority provides:

> The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of any unfair labor practice under any of the provisions of this Act, if such expressions contain no threat of reprisal or force or promise of benefit.[63]

The purpose of the Amendment was made clear by the Committee reports on the proposed bills:

> This guarantees free speech to employers, to employees, and to unions. Although the Labor Board says it does not limit free speech, its decisions show that it uses against people what the Constitution says they can say freely . . . the bill corrects this, providing that nothing that anyone says shall constitute or be evidence of an unfair labor practice unless it, by its own express terms, threatens force or economic reprisal. House Report No. 245 on H.R. 3020, Section 8(d)(1), 80th Cong., 1st Sess.

The Senate Committee report provided:

> Another amendment to this section would insure both to employers and to labor organizations full freedom to express their views to employees on labor matters, as long as they refrain from threats of violence, intimation of economic reprisal, or offers of benefit. The Supreme Court in *Thomas* v. *Collins*, (323 U.S. 516), held, contrary to some earlier decisions of the Labor Board, that the Constitution guarantees freedom of speech on either side in labor controversies and approved the doctrine of *American Tube Bending* case (134 F.2d 993). The Board had placed a limited

63. 29 U.S.C. § 8(c).

> construction upon these decisions . . . the Committee believes these decisions to be too restrictive . . . . Senate Report No. 105 on S. 1126, Section 8(c), 80th Cong., 1st Sess.

If balancing the interests is a "judgment in the first instance . . . for the legislative [illegible]"[64] the judgment of Congress was clear. The only exception in the judgment of Congress was communication containing "threat of reprisals, or force, or promise of benefit" and no other. Indeed, Congress went further by providing protected statements could not be "evidence" of an unfair labor practice under "any provisions of this Act."[65]

But the Board in this case has again ignored the guarantees of the First Amendment and Congressional intent. In an almost identical case, *NLRB* v. *Golub Corp.*, 388 F.2d 921 (2nd Cir. 1967), the Board found employer speech was likely to create and instill in the minds of the employees fear of economic loss or suffering. There, as here, the focus was not on the language used in the communication but on the "belief" which might be created. Judge Friendly rejected this approach:

> This is reading the Act as if § 8(c) did not exist; while there is a risk that an employer's prediction of adverse consequences from unionization may be taken as a threat to produce them, to hold that this danger alone suffices to convert a prediction into a threat of reprisal would go back to the very position of the early 1940's which § 8(c) was adopted to change. 388 F.2d at 928.

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64. Justice Rutledge in *Thomas* v. *Collins*, supra, 323 U.S. at 531.

65. To be sure the modifying language "by its own term" of H.R. 3020, Section 8(c)(1), was eliminated in final conference, but the conference also eliminated the modifying language "under all the circumstances" of S. 1126, Section 8(c), which would have initiated an unlimited search of the "background", rather than a hard look at the words spoken.

The views of Judge Hand in *American Tube, supra* (which were given congressional recognition by the 8(c) amendments to the Taft-Hartley Act) further support this conclusion. There is no difference between this expression and the *American Tube* expression that "a union would be against the employees' interests . . . and that the continued prosperity of the company depended on going on as they had been." The speeches may not have been as "temperate in form" as those in *American Tube,* but speech is no less protected because of "vehement, caustic, and sometimes unpleasantly sharp attacks." *Linn* v. *Plant Guards, supra.*

Other circuits have rejected the employee "belief" or "impression" test. The focus has properly been placed on the word used and only unless the employer uses his economic power, or threatens to use his economic power, will the words "constitute intimidation" to bring about the "rare" case where speech may be enjoined.[66]

Likewise, requiring the employer to prove economic justification for its views, as did the First Circuit, clearly offends constitutional standards. "Authoritative interpretations of the First Amendment guarantees have

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66. *NLRB* v. *Hobart Brothers Co.*, 372 F.2d 203 (6th Cir. 1967); *NLRB* v. *TRW-Semiconductors, Inc.*, 385 F.2d 753 (9th Cir. 1967); *Amalgamated Clothing Workers* v. *NLRB*, 365 F.2d 898, 909 (D.C. Cir. 1966); *J. S. Dillon & Sons Stores Co.* v. *NLRB*, 388 F.2d 395 (10th Cir. 1964); *NLRB* v. *Threads, Inc.*, 308 F.2d 1, 9 (4th Cir. 1962); *P. R. Mallory & Co.* v. *NLRB*, 389 F.2d 702 (7th Cir. 1967).

The Eighth Circuit, in *NLRB* v. *Herman Wilson Lumber Co.*, 355 F.2d 426 (1966), relying upon decisions of the Fifth, Sixth and Third Circuits, decided:

> It is well settled that under section 8(c) the employer must be regarded as a rightful contestant for his employees' loyalty in a union election. This section permits the employer to state his legal rights under the Act and to predict that dire economic consequences will follow from a union victory . . . it is only when the employer goes further and threatens himself to take economic or other reprisals against the employees that a section 8(a)(1) violation may be found. 355 F.2d at 431-32.

consistently refused to recognize an exception to the test of truth—whether administered by judges, juries, or administrative officials—and especially one that puts the burden of proving truth on the speaker," and "the constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered'." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 271.

Finally, the Court erred in deferring the speech question to Board expertise. "The Court must examine for itself" the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which principles of the First Amendment . . . protect." *Pennekamp* v. *Florida*, 328 U.S. 331, 335. "Whatever vitality decisions . . . giving weight to an agency's construction of statutory language may have generally . . . such considerations have little weight when the statute being enforced approaches the limits of constitutional power." *NLRB* v. *Golub Corp.*, 388 F.2d 921, 928 (2d Cir. 1967).

Thus, when proper recognition is given to constitutional principles, the statement of Sinclair "that another strike could, and in his opinion would, close the plant" is recognized by all other circuits as a prediction of "dire consequences" and not a threat that the employer himself will take economic reprisals. This is particularly true as Sinclair told the employees it would bargain in good faith (G.C. Ex. 14; App. 126) and "we would not close the plant in retaliation for employees voting for the union" (G.C. Ex. 17; App. 132). For this reference to strike and the other statements enumerated by the First Circuit, the remedy under the principles of the free debate "is for the union to answer them, not a cease and desist order." *NLRB* v. *TRW-Semiconductors, Inc.*, 385 F.2d 753, 760 (9th Cir. 1967). Or, put another way, ". . . it is up to the participants in a cam-

paign to find and counteract any statements that they deem inaccurate or misleading." *NLRB* v. *Hobart Brothers Company*, 372 F.2d 203, 206-07 (6th Cir. 1967).

And short of clear threats by an employer to take reprisals or of vote buying by promising benefits, all other views, arguments or opinions must be protected, as Congress recognized. If this were not the case, the free debate would cease to be useful as a tool to provide information to facilitate a reasoned choice concerning the direction the plant or industrial democracy is to take.

The selection of a bargaining representative, with its manifold long-term ramifications on the industrial life of an employee, is a sufficiently weighty decision to warrant a free discussion of all the relevant considerations involved and to test the durability of the union's alleged majority in the crucible of a pre-election campaign. The need for such a discussion, in addition, is not only contemplated by the statute to permit a reasoned choice by employees, but also properly may be considered to find justification in the interests of the employer to exercise its free speech rights and in a need to protect employees "from the hazards of letting their militancy outrun their power".[67] Employees should be informed by such debate

> . . . of the realities that may result from union representation in choosing whether to accept or reject a collective bargaining representative. Moreover, if the choice by employees as to union representation is to be rational, employees should be entitled to know the possible consequences of strike action and how such action may affect them and their future. . . . The employer's bargaining attitude, the possibilities of losing present customers, long and crippling strikes, replacement of strikers, are all signficant factors which em-

67. *Lesnick, supra*, note 9, at 857-8.

ployees should be able to weigh in making a reasoned choice. . . .[68]

But while the Board has traditionally[69] and just recently[70] been concerned with providing every opportunity for union rebuttal to employer's speech, it has returned to the Wagner Act by regulating the contents of the speech, particularly if the views stated are unpopular with it.[71] It

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68. Pokemper, *Employer Free Speech Under the National Labor Relations Act*, 25 Md. L. Rev. 111, 146-47 (1965).

69. *Peerless Plywood Co.*, 107 NLRB 427, provided "captive" audience speeches within the 24-hour period preceding the election would be the basis for setting aside the election. *Hollywood Ceramic Co.*, 140 NLRB 221, declared material misrepresentations of material facts made on the eve of the election and thereby precluding reply would be the basis for setting aside the election. Other rules for the conduct of the "debate" limit captive audience speeches if union access or solicitation is limited by company rule. See, *Livingston Shirt Co.*, 107 NLRB 400, and the decision of this Court in *NLRB* v. *United Steelworkers* (*Nutone, Inc. and Avondale Mills*), 357 U.S. 357 (1958).

70. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239 (1966). Within seven days after the election is directed, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all eligible voters. The Regional Director, in turn, makes this information available to all parties. The purpose of this rule, as well as the rules in note 69, was to establish a free debate. In *Excelsior*, the Board noted:

> Among the factors that undoubtedly tend to impede such a choice is a lack of information with respect to the choices available. In other words, an employee who has had an effective opportunity to hear arguments concerning representation is in a better position to make a more fully informed and reasoned choice. 156 NLRB at 1240.

Thus, another step was taken in this direction by providing the union with names and addresses of eligible employees so the union might distribute its views in writing (the mode of expression found so inimical by the Board here) or visit employees at their homes. This is analogous to the very limited regulation of federal elections by such measures, for example, as the equal time provision of the Federal Communications Act.

71. The motion picture "And Women Must Weep" has been roundly condemned by the Board as "it pictures a labor dispute as one in which Americanism, religion, family, motherhood, and innocent childhood are arrayed on one side, and goons, brutes, and murderers on the other or pro-union side." *Carl T. Mason*, 142 NLRB 480, 486. Showing of the movie has been held by the Board to violate Section 8(a)(1), but enforcement was denied

has failed to recognize, as an eminent commenator has suggested:

> . . . the policies adopted towards rebuttal [are] intimately related to those that govern the context of hat may be said and written on both sides. More specifically, as the opportunity to reply is enhanced, the need for regulating the context of speech tends to diminish. Of course, the two policies are not perfect substitutes; one can hardly reply on rebuttal to cure clear threats of retaliation or serious misrepresentations on the eve of the election. But in the gray areas with which doctrinal controversy has been concerned, an adequate opportunity to reply will go far to remove the need for expanding controls over the context of speech.[72]

CONCLUSION

We respectfully submit that speech here involved was entitled to constitutional and 8(c) protection. The whole span of the constitutional history of the First Amendment in labor relations demonstrates a clear recognition that restraint of speech presenting only the most serious danger should dampen the free discussion and free debate envisioned by the Constitution. Where, as here, speech is dissociated from unlawful conduct and in itself contains no

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in *NLRB* v. *Hawthorn Co.*, ____ F.2d ____, 70 LRRM 2193 (8th Cir. 1969). The Court relied in part on the fact organized labor's answer, another film "Anatomy of a Lie," was shown at the next union meeting.

72. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Har. L. Rev. 38, 91 (1964). This somewhat restrained criticism of the Board was written before the adoption of *Excelsior*, *supra*, note 70, and Professor Bok's concern over the opportunity for reply would seem to be obviated.

threat or promise of benefit, it is fair comment and free speech. Where, as here, speech otherwise free is determined by the Board to be unlawful because in the Board's view the "totality of speech" unfairly "impresses" the listener's state of mind then the Board is acting as a censor and applying its own standards, not the standards set down by law. The answer is found not in *censorship*, but in *debate*. This answer was supplied by this Court in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 and in *Linn*, 383 U.S. at 162, where this Court recognized that 8(c) encouraged "debate on issues dividing labor and management"; debate which should not be limited but which may be "uninhibited, robust, and wide open"; debate which "may well include vehemency, caustic and sometimes unpleasantly sharp attacks." Debate then, and the opportunity to reply, is the answer—not censorship.

This Court spoke of our constitutional guarantees of freedom of speech in *Thomas* and in related decisions. Congress spoke through the 8(c) amendments to the Taft-Hartley Act, and that will is to be obeyed. The Board, no less than the courts, must give the law its full effect "in accordance with its design and purpose. . ."[73]; it must "look to the provisions of the whole law and to its object and policy."[74] This the Board failed to do.

Deference to the teachings of this Court and Congress, we submit, would have required a finding that the commu-

73. *Takao Ozawa* v. *United States*, 260 U.S. 178, 194.
74. *Maestro Plastic Corp.* v. *NLRB*, 350 U.S. 270, 280.

nications to the employees here was free speech and fully protected. The decision of the Board should be reversed.

Respectfully submitted,

HARRY L. BROWNE
JACK L. WHITACRE
1000 Power and Light Building
106 W. 14th Street
Kansas City, Missouri 64105
Attorneys for American Retail Federation As Amicus Curiae

SPENCER, FANE, BRITT & BROWNE
1000 Power and Light Building
106 W. 14th Street
Kansas City, Missouri 64105
Of Counsel